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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

NIKOLAS JAMES NEUBAUER,

Defendant and Appellant.

C086194

(Super. Ct. No. CM043729)

Defendant Nikolas James Neubauer was granted formal probation after pleading no contest to a domestic violence offense. The court subsequently revoked probation and sentenced defendant to serve three years in state prison after finding he had violated a condition of probation requiring him to successfully complete a batterer's treatment program and not terminate participation in the program without the court's or his probation officer's permission.

On appeal, defendant contends insufficient evidence supports the trial court's finding that he willfully violated the terms of his probation because he was in custody on

two of the four program days he missed, which he argues were excused absences that were not his fault. We conclude sufficient evidence supports the trial court's finding defendant willfully violated the terms of his probation. Consequently, it did not abuse its discretion in revoking probation. We affirm.

#### FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In November 2015, defendant pleaded no contest to inflicting corporal injury on his child's mother (Pen. Code, § 273.5, subd. (a))<sup>1</sup> in Butte County case No. CM043729. The court suspended imposition of sentence and granted defendant probation for three years. Defendant's written plea agreement included a requirement that he complete a 52-week domestic violence counseling program, and the terms and conditions of formal probation included special condition No. 10 that stated: "[w]ithin seven (7) days of being granted probation or released from custody, provide proof of enrollment in, payment of and thereafter, successful completion of a Batterer's Treatment program/class, and not terminate participation in said program/class without the permission of the Court or probation officer." Defendant signed a copy of the terms and conditions of probation, acknowledging he had "received a copy, read/have had read to me, and understand the above conditions."

Defendant enrolled in the New Beginnings domestic violence program and had his initial intake appointment with Mallory Eastman, the program coordinator, on June 9, 2017. He attended his first class on June 21, 2017, but failed to attend the next four classes. Defendant did not notify New Beginnings of the reasons for any of the absences, and was terminated from the program two weeks later.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Based on his termination from the New Beginnings program, the probation department filed a petition for violation of probation. The petition alleged defendant was terminated from the New Beginnings Batterers Treatment Program without court or probation officer permission on August 17, 2017, violating special condition No. 10 of the terms and conditions of his probation.

At a probation revocation hearing on October 17, 2017, Eastman testified that at defendant's initial intake appointment, she reviewed the program's absence policy, the fee agreement, and the program's rules and regulations with defendant. He was given an orientation packet or binder with the rules and policies, and Eastman explained the attendance and class participation expectations to him.

According to Eastman, enrollees were allowed three unexcused absences; a fourth unexcused absence resulted in termination from the program. An enrollee had two weeks after an absence to prove the reason for that absence. An absence was excused if the enrollee had medical documentation, he or she was in custody, or a supervisory probation officer authorized the absence. These rules were included in defendant's orientation packet that he signed.

Based on class sign-in sheets, Eastman testified defendant did not attend class on July 5, July 12, July 19, and July 26, 2017.<sup>2</sup> He was subsequently terminated from the program. On September 27, 2017, nearly a month after being terminated, defendant contacted New Beginnings to inquire about reenrolling in the program. Eastman had not received any contact from defendant or his probation officer prior to that date.

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<sup>2</sup> Defendant also failed to attend class on August 16, 2017.

Butte County Probation Officer Eugene Bullard also testified at the hearing. Bullard received the letter from New Beginnings notifying the probation department defendant had been terminated from the program.

According to Bullard, defendant was in custody in Butte County from June 26 to July 2, 2017. He was in custody in Yuba County on another matter from July 12 to July 21, 2017.<sup>3</sup> Defendant was in custody in Butte County from July 28 to August 3, 2017. He was rearrested on August 17 and released from custody on September 26, 2017. Bullard conceded defendant missed the July 12 and July 19 New Beginnings classes because he was in custody in Yuba County, but testified that under the probation department policies, being in custody did not constitute a valid excuse for missing a required treatment program class.

Defendant testified on his own behalf. He testified that he attended his first New Beginnings class on June 21, 2017. The following day, defendant attended a court hearing in Butte County for a violation of probation alleging he had tested positive for marijuana and methamphetamine on several occasions in May and June 2017.<sup>4</sup> Defendant admitted the violations. The court ordered defendant incarcerated for 15 days for the violation.

Upon his release, defendant contacted Wendy Oliver, a Butte County probation officer, to update her and let her know he had to go to Yuba County for another matter. Defendant claimed he missed the July 5 class because he had to make a “judgment call”

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<sup>3</sup> Bullard explained defendant had been released on postrelease community supervision in the Yuba County matter, and was subsequently incarcerated for violating the terms of his supervision.

<sup>4</sup> The court dismissed an allegation that defendant had failed to enroll in the required batterer’s treatment program.

on whether to use his money to address an active felony warrant in Yuba County, or for the class. Defendant chose to address the active felony warrant because that seemed a higher priority. However, during cross examination, he admitted he did not go to Yuba County on July 5 even though he had decided to miss his New Beginnings class on that date for that reason.

Defendant was in custody in Yuba County from July 12 to July 21, 2017, causing him to miss his July 19 class date. He claimed that after being released, he again contacted Oliver to set up an appointment. He also contacted his attorney, who informed him a court date on another issue was rescheduled for July 30, 2017. But prior to that date, defendant was arrested and held in custody from July 28 to August 3, 2017. After his release, he claimed he continued attending counseling sessions in Yuba County and contacted Oliver and Kayla Atkinson, another probation officer in Butte County. They supposedly told him it was fine for him to go to Yuba County to take care of the other pending issues.

Defendant was held in custody in Yuba County from August 17 to September 26. After being released, he testified he immediately contacted Atkinson and New Beginnings.

Following the evidentiary hearing, the court found defendant violated his probation. The court found he had missed four classes, and no evidence showed any of his probation officers had excused any of his absences. The court revoked probation and sentenced defendant to serve the middle term of three years in state prison for the underlying corporal injury offense. Defendant timely appealed.

## DISCUSSION

Defendant contends insufficient evidence shows he willfully violated the terms of his probation. He argues there was no evidence the violation was his fault or that he

purposefully disrespected the court, probation, or the batterer's program. We conclude sufficient evidence supports the trial court's revocation of probation.

A court is authorized to revoke or terminate probation "if the interests of justice so require and *the court, in its judgment, has reason to believe* from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision . . . ." (§ 1203.2, subd. (a), italics added.) "It has long been recognized that the Legislature, through this language, intended to give trial courts very broad discretion in determining whether a probationer has violated probation." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443; *People v. Lippner* (1933) 219 Cal. 395, 400 ["only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation"].) While "[r]evocation rests in the sound discretion of the [trial] court[,]. . . the court may not act arbitrarily or capriciously; its determination must be based upon the facts before it." (*People v. Buford* (1974) 42 Cal.App.3d 975, 985.)

"[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence." (*People v. Rodriguez, supra*, 51 Cal.3d at p. 439.) Where the trial court resolves conflicting evidence to determine whether a probationer willfully violated probation, review on appeal is based on the substantial evidence test. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848.) Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence that supports the trial court's decision. (*Ibid.*) We defer to the trial court, resolving all inferences, intendments, and conflicting evidence in favor of the judgment. (*Id.* at p. 849.)

"The terms 'willful' or 'willfully,' as used in penal statutes, imply 'simply a purpose or willingness to commit the act. . . . The terms imply that the person knows what he [or she] is doing, intends to do what he [or she] is doing, and is a free agent.

[Citation.] Stated another way, the term ‘willful’ requires only that the prohibited act occur intentionally. [Citations.]” (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438; see also § 7, subd. (1) [“The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage”].)

Here, the record shows New Beginnings’ absence policy permitted enrollees three unexcused absences; a fourth unexcused absence resulted in termination from the program. According to Eastman, an absence was excused if the enrollee had medical documentation, was in custody, or the absence was approved by his or her probation officer. Enrollees had two weeks to notify New Beginnings of the reason for any absences. Defendant knew about these policies and procedures because Eastman explained them to him during his initial intake interview. Defendant also signed the intake packet that included the program’s rules and regulations as well as absence explanation forms.

Defendant missed four classes, two of which were because he was in custody. While the evidence conflicted over whether being in custody constituted an excused absence—Probation Officer Bullard testified it was not and Eastman testified it was—it was undisputed defendant had two weeks after missing a class to inform New Beginnings of the reason for the absence in order to have it excused. It was also undisputed that defendant did not contact New Beginnings within the appropriate time period to inform the program administrators of the reasons for his absences. Nor was there any evidence defendant’s probation officers approved the absences.

Defendant had the opportunity to make phone calls after he was released from custody. He testified that he called his probation officers as well as his attorney. For

whatever reason, defendant did not call New Beginnings until September 27, 2017, over a month *after* he had been terminated from the program.

Based on this evidence, sufficient evidence supports the trial court's conclusion defendant willfully violated his probation when he was terminated from the batterer's treatment program for unexcused absences. The trial court did not abuse its discretion in revoking defendant's probation.

The cases defendant cites do not dictate a different result. (See *People v. Zaring* (1992) 8 Cal.App.4th 362, 376, 379 [violation not willful where the defendant was 22 minutes late to court because her driver had to drop her children off at school first]; *People v. Galvan* (2007) 155 Cal.App.4th 978, 983 [failure to report to the probation department within 24 hours of release from custody did not constitute willful violation of probation because the federal government deported the defendant immediately upon his release from county jail]; *People v. Buford*, *supra*, 42 Cal.App.3d at p. 985 [evidence showed defendant was tardy and undependable in reporting but not that he failed to report to his probation officer as directed].) In *Zaring*, the court found the circumstances were last-minute and unforeseen. In *Galvan*, the court found the circumstances were out of the defendant's control. In *Buford*, the court found defendant had not been advised of his duty to report on a regular monthly basis so could not be faulted for not responding to the probation officer's communications.

Unlike in *Zaring*, *Galvan*, and *Buford*, the circumstances faced by defendant in this case were not unforeseen, out of his control, or the result of not being properly informed of his probation terms. Here, defendant never contacted New Beginnings to change his unexcused absences to excused absences. There is no evidence he asked his probation officer to authorize his absence. Despite contacting his probation officer and attorney upon being released from custody, defendant did not contact New Beginnings to have his absences excused. And when he did contact New Beginnings



about a month after being terminated from the program, he was asking about reenrolling in the program.

We conclude sufficient evidence shows the violation of probation was willful. The trial court was well within its discretion to revoke probation and sentence defendant to state prison.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_/s/  
HOCH, J.

We concur:

\_\_\_\_\_/s/  
BUTZ, Acting P. J.

\_\_\_\_\_/s/  
DUARTE, J.